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INTERNATIONAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

CHURCH OF SCIENTOLOGY INTERNATIONAL, a California not-for-profit religious corporation; Plaintiffs, vs. GERALD ARMSTRONG; MICHAEL WALTON; et al., Defendants.	CASE NO. 157 680 REPLY IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S DEMURRER AND MOTION TO STRIKE GERALD ARMSTRONG'S SECOND AMENDED CROSS-COMPLAINT
GERALD ARMSTRONG, Cross-Complainant, vs. CHURCH OF SCIENTOLOGY INTERNATIONAL, a California Corporation; DAVID MISCAVIGE; DOES 1 to 100; Cross-Defendant.	DATE: June 10, 1994 TIME: 9:00 a.m. DEPT: 1 DISC. CUT-OFF: Aug. 30, 1994 MTN. CUT-OFF: Sept. 13, 1994 TRIAL DATE: Sept. 29, 1994

when, "[t]here is another action pending between the same parties on the same cause of action," because the first suit affords an ample remedy, rendering the second action unnecessary and vexatious. National Auto. Ins. Co. v. Winter (1943) 58 Cal.App.2d 11, 16, 136 P.2d 22, 25.

None of the referenced allegations are necessary to state a claim for abuse of process, all are scandalous, irrelevant and improper, and this Court has already held that the earlier Los Angeles action precludes Armstrong from raising them here.

III. ARMSTRONG REMAINS UNABLE TO STATE ANY CLAIM FOR RELIEF BASED ON ABUSE OF PROCESS

Armstrong's second amended cross-complaint, in its entirety, consists of allegations describing communications or conduct which do not describe actionable conduct because they are (1) barred by the statute of limitations, (2) have nothing to do with the Court's processes, and/or (3) absolutely privileged under well-established California law.

A. Most Of Armstrong's Allegations Are Barred By The Statute Of Limitations

As noted in Part II, supra, those portions of the complaint which describe matters that are beyond the scope of the statute of limitations are also completely duplicative of allegations contained in the cross-complaint which Armstrong is attempting to pursue in the Los Angeles action. They comprise the bulk of the second amended cross-complaint, and allege, generally, Armstrong's dissatisfaction with his 1986 agreement to accept a large monetary amount in settlement of litigation in exchange, inter alia, for a promise that he would neither publicize his claimed Scientology experiences nor voluntarily seek to aid would-be litigants against the settling Church and related entities. According to Armstrong, their "gravamen" is that Church

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[4](...continued)
than forty paragraphs alleging this "context," make plain that the real purpose behind Armstrong's pleading, and his opposition herein, is to engender hatred and ill will toward the Church.

attorneys purportedly "subverted" Armstrong's attorney, who then, presumably, "subverted" Armstrong himself into signing the agreement.[5]

Just as he did in response to plaintiff's earlier demurrer, Armstrong attempts again to justify his interjection of these old claims into this action by contending that the Court "could" impose liability for these stale claims on a 'continuing tort' theory. [Oppo. at 8-9] He provides no relevant or current law for this theory, because none exists. The cases which he cites for this remarkable proposition are federal cases which involved a continuous course of conduct that resulted in an accumulated physical injury -- allegedly improper drug therapy provided by the Veteran's Administration over the course of 19 years, causing severe mental and physical injury (Page v. United States (D.C.Cir. 1984) 729 F.2d 818), and allegedly requiring the plaintiff to operate an air hammer which repeatedly "jolted" his shoulders over the years, causing a gradual onset of arthritis (Fowkes v. Pennsylvania R.R. Co. (3d Cir. 1959) 264 F.2d 397. Plaintiff noted this in its earlier demurrer, and repeated that the theory is not applicable to a claim of abuse of process, and that plaintiff could not locate any California court that has ever held otherwise. Armstrong was apparently still unable to locate any California authority to support his theory either, as he has merely repeated the same argument here.

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[5] It should be noted that even if these claims were not barred by their duplicative nature and the statute of limitations, Armstrong's allegations that the Church's lawyers impermissibly pressured his lawyer into agreeing to settle the earlier litigation would nonetheless be barred by the absolute privilege afforded by Civil Code §42(b)(2). Rosenthal v. Irell & Manella (1982) 135 Cal.App.3d 121, 126-128, 185 Cal.Rptr. 92, 95-96 (Claimed inducement of insurers to settle action without permission of insured was privileged communication); Asia Investment Co., Ltd. v. Borowski (1982) 133 Cal.App.3d 832, 842-843 (Claim that party filed an environmental action and used it to threaten plaintiff in an attempt to get him to settle main action sought relief for communications which were absolutely privileged). Indeed, in Asia Investment, the court noted that "there is an element of coercion present in every lawsuit," and that "[s]ettlement of disputes has long been favored by the courts and attorneys should be accorded wide latitude in making statements during settlement negotiations." Id. at 843.

B. Armstrong's New Allegations Concerning Alleged Witnesses Do Not Support A Claim For Abuse Of Process Against Plaintiff

The additions to Armstrong's abuse of process claim do not bolster it in the slightest. Armstrong now argues that the Church can be held liable for abuse of process because of settlement agreements which he claims were entered into in 1986. Armstrong argues that those agreements contain provisions which prevent the contracting parties from aiding him in his litigation. Armstrong makes no attempt to explain how persons who settled with the Church in 1986 could provide testimony relevant to the claims at issue in this case: that Armstrong fraudulently conveyed away money and real property, beginning in 1990. Rather, Armstrong argues strenuously that the agreements violate public policy, because he has no money to take depositions,[6] and that the Church is abusing process in 1994 when it refuses to release these persons from their agreements.

In Armstrong's own agreement with the Church, Armstrong promised to no longer aid others litigating claims against the Church. [Ex. 2 to Request for Judicial Notice at 7.] Armstrong argued that he should not be held to this promise, because it violated public policy and the rights of others who might desire his assistance. These arguments were rejected by two superior court judges (Judge Dufficy of this Court, who issued a temporary restraining order on March 5, 1992, and the Honorable Ronald N. Sohigian of the Los Angeles Superior Court, who issued a preliminary injunction on May 28, 1992) and, just last month, by the Second District Court of Appeal. Armstrong's suggestion that the Church should obviate any agreements made with others because he persists in claiming that such agreements violate public policy is

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[6] Armstrong's claimed lack of funds is irrelevant and insults the intelligence of the Court as well. Armstrong received nearly $800,000 in settlement from the Church in 1986. He has claimed in deposition that he transferred at least $1.5 million in assets to other people in 1990, including transfers that were characterized by Armstrong as "loans." Armstrong has the ability and the wherewithal to take ordinary discovery; he has not because he recognizes that there is no relevant testimony that these "witnesses" could provide.

frivolous.

Armstrong argues that because he must subpoena these witnesses if he wishes them to testify, the Church "is exerting control over both sides of the litigation, which constitutes an abuse of process."[7] [Oppo. at 10] The cases which he cites for this proposition, however, demonstrate the opposite to be true. Neither was an abuse of process case, and neither had facts even remotely resembling the facts which Armstrong alleges.

In O'Morrow v. Board (1946), 27 Cal.2d 794, 167 P.2d 483, for example, two motorists involved in a collision sued one another, but were insured by the same insurance company. The court held that the single insurance company could not direct the lawyers for both of the parties, because the interest of the insurance company would be to have a result of 50% negligence of each party, so that neither could recover against the other. In Golden Gate Bridge and Highway Dist. v. Felt (1931) 214 Cal. 308, 5 P.2d 585, also cited by Armstrong, the court found that a dispute between the board of directors of the highway district and its secretary over the legitimacy of a bond issue was not collusive, even though it was conceded that both sides actually wished to achieve the same result.

Moreover, Armstrong fails to respond at all to plaintiff's argument that the refusal by Ms. Bartilson to capitulate to Greene's demands is simply not a "use" of the processes of the court. "The gist of the tort [of abuse of process] is the misuse of the **power of the court**: It is an act **done under the authority of the court** for the purpose of perpetrating an injustice. . . ." Younger v. Solomon (1974) 38 Cal.App.3d 289, 297, 113 Cal.Rptr. 113, 118 (emphasis supplied). While "process" has been broadly interpreted to include an entire range of procedures necessary to litigation, Barquis v. Merchants Collection Association (1972) 7 Cal.3d 94, 104, 101 Cal.Rptr. 752, 496

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[7] Indeed, the proposition that the Church is exerting control over Armstrong or his attorneys is absurd, as Armstrong's own repetitive frivolous filings demonstrate.

P.2d 817, it has not been stretched to include correspondence between attorneys regarding settlement agreements with third parties. Indeed, these paragraphs may not be used to support an abuse of process claim, because they do not allege any use of process at all.

C. The Remaining New Allegations Describe Communications Which Are Absolutely Privileged

Armstrong also argues that he may maintain an abuse of process action against the Church because the Church recorded a lis pendens on the real property at issue in this action to protect its interests, and because the Church filed a declaration mentioning Armstrong in another case, which "induced" Armstrong to further breach his agreement. As plaintiff demonstrated in its moving papers, these allegations describe privileged communications. The records of this Court also demonstrate Armstrong's argument concerning lis pendens to be false.

In Rubin v. Green (1993) 4 Cal.4d 1187, 17 Cal.Rptr.2d 828, the California Supreme Court recently re-emphasized that,

> For well over a century, communications with "some relation" to judicial proceedings have been absolutely immune from tort liability by the privilege codified as section 47(b). At least since then-Justice Traynor's opinion in Albertson v. Raboff (1956) 46 Cal.2d 375, 295 P.2d 405, California courts have given the privilege an expansive reach. Indeed, as we recently noted, "the only exception to [the] application of section 47(2) [now § 47(b)] to tort suits has been for malicious prosecution actions. [Citations]."

Rubin v. Green (1993) 4 Cal.4d 1187, 1194, 17 Cal.Rptr.2d 828, 831, quoting Silberg v. Anderson (1990) 50 Cal.3d 205, 216, 266 Cal.Rptr. 638, 786 P.2d 365. In Rubin, the court held that even communications and communicative conduct bearing "some relation" to an anticipated lawsuit were privileged. Id. at 832 - 838.

Moreover, in Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 232 Cal.Rptr. 567, the California Supreme Court, upholding a long line of appellate court cases, held that filing or maintaining a lawsuit cannot support a claim for abuse of process. Indeed, the privilege for publications in a lawsuit applies not simply to a complaint, but also to all publications in judicial

proceeding, so long as the publication "(1) . . . was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." Umansky v. Urquhart (1978) 84 Cal.App.3d 368, 371, 148 Cal.Rptr. 2d 547.

Armstrong has also alleged that a declaration of David Miscavige in the case of United States v. Fishman, Case No. CV 91-6426 HLH(Tx), United States District Court for the Central District of California, supposedly was filed for an ulterior purpose. As plaintiff demonstrated in its moving papers, the declaration was filed in response to allegations made by the defendant in that action, including allegations made about Armstrong. [See Ex. 9 to Request for Judicial Notice at ¶ 54.] It had a logical connection to the action, was filed to refute facts alleged in a motion brought by the opposing party, and involved the litigants to that action and a proposed deponent (the declarant).[8] The filing of the declaration, then, was an absolutely privileged act, which cannot form the basis for an abuse of process claim.

The recording of the lis pendens was equally privileged. A review of this Court's own files will reveal that Armstrong's allegations in this regard are absolutely false.[9] Moreover, just as the filing of this action cannot support a claim for abuse of process,

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[8] Indeed, the bulk of the declaration is not about Armstrong, who is mentioned only incidentally. Only Armstrong's megalomanic ego could draw the conclusion that the declaration demonstrated a "purpose" of injuring Armstrong in some way, rather than forwarding the interests of the declarant in the litigation in which the declaration was filed.

[9] Armstrong has quoted, but not attached, something which he claims was an October 29 order issued by this court. However, plaintiff's counsel never received notice of any such order or proposed order, and was not able to find any such order by examining the court's records. Plaintiff can only conclude that Armstrong is quoting something which Sonia Walton's attorney drafted as a proposed order and provided to him, but not to plaintiff's counsel. Since plaintiff did not oppose Ms. Walton's motion, but entered into an agreement to lift the lis pendens prior to the hearing date [See Ex. 10 to Request for Judicial Notice], it would have been improper for an order reciting that the court considered an opposition and argument which did not take place. Armstrong has not attached this claimed "order" to his opposition. Reference to it is improper, and should be stricken.

I. INTRODUCTION

As set forth in the moving papers, Armstrong's third attempt to cross-claim in this action fails from precisely the same defects as his first two attempts: the acts which he alleges are (1) time-barred, (2) already being litigated in the Los Angeles Superior Court (3) do not use process at all, and/or are (4) absolutely privileged. Further, although demurrer was sustained to his first amended cross-complaint, Armstrong has persisted in loading his complaint with stale and malicious allegations for the sole purpose of prejudicing the Court.

Armstrong argues, yet again, that his abuse of process claims are not barred by the statute of limitations, citing no California law to support his theory. He is in error. California law bars his complaint. Further, each and every one of the matters which he complains of that face the statute's bar are also alleged in his Los Angeles action. As demonstrated in plaintiff's previous two demurrers, and again here, the pendency of that litigation bars his cross-complaint as well.

Armstrong's claim that he can maintain an abuse of process claim based on communications made by plaintiff's lawyers in connection with this or other litigation is also a misstatement of California law. The California Supreme Court has held directly to the contrary.

This Court has endured Armstrong's machinations long enough. Demurrer should be sustained without leave to amend, and plaintiff Church awarded sanctions.[1]

II. ARMSTRONG'S ATTACK ON THE CHURCH, HIS FORMER LAWYER, AND THE SETTLEMENT AGREEMENT ITSELF MERELY REPEAT ALLEGATIONS WHICH ARE BEING LITIGATED IN THE LOS ANGELES ACTION

This Court has already ruled that matters which were alleged in the first amended cross-complaint, and were all fully alleged in a cross-complaint filed by Armstrong in Los Angeles, may not form the basis for a cross-complaint here. [Order, Ex. 7 to

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[1] If necessary, paragraphs 9 through 53 should also be stricken in their entirety, and with prejudice.

Request for Judicial Notice, attached to Moving Papers] Nonetheless, Armstrong has repeated those allegations verbatim. Because Armstrong has repeated those allegations in the face of this Court's earlier ruling, the Church has asked this Court to strike them. Armstrong's only response, contained in his opposition to the motion to strike, is to insist that the Church's reference to paragraphs 9 through 53 in full is insufficiently clear; to repeat the general subject matter of those paragraphs; and then to assert that they are not scandalous, while accusing "Scientology" of having a motive that is "immoral, evil and destructive of justice."[2] [Oppo. to Strike at 6] Armstrong's language in this regard is illustrative of precisely the scandalous, irrelevant and improper material which the Church seeks to exclude.

Further, the bulk of Armstrong's second-amended cross-complaint, (and the bulk of his opposition), does not even mention the claimed "abuse of process," but instead focuses on stale claims from as early as 1986, all of which are alleged in Armstrong's Los Angeles action, and barred by the statute of limitations [See Part III, infra]. Indeed, Armstrong once again complains at length that he was betrayed by his former lawyer, Michael Flynn, in 1986.[3] This stale claim is already the object of Armstrong's Los Angeles cross-complaint [Plaintiff's Request for Judicial Notice, Ex. 2, at ¶¶ 14 - 20], and of plaintiff's pending motion for summary adjudication [Id., Ex. 4, 5, at 7]. There is no reason to re-litigate it here.[4] According to C.C.P. § 430.10(c) demurrer is proper

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[2] "Scientology" describes an entire religion, not the Church which is the plaintiff here. Armstrong persists in referring to the Church as "Scientology" merely because he knows that the Church finds it offensive; it is similar to referring to Notre Dame Cathedral as "Catholicism," and then insisting that "Catholicism" is evil and immoral because "Catholicism" is attempting to enforce a contract.

[3] Armstrong accuses Flynn of "betraying" him into accepting a settlement of approximately $800,000, the consideration foolishly paid by the Church in exchange for promises which Armstrong claims he never had any intention of keeping.

[4] The contrast between Armstrong's argument that his claims of supposed "bad acts" dating back to 1986 are alleged only to "provide context," and his devotion of more (continued...)

neither can the filing of a lis pendens, no matter what bad motives Armstrong wrongly attempts to ascribe to that filing. For over eighty years, it has been the law in California that "the defendant's malice or bad faith does not affect the privileged character of the [47(b)] publication." Gosewisch v. Doran (1911) 161 Cal. 511, 514, 199 P. 656.

This principle has been applied very recently to abuse of process claims. In Oren Royal Oaks, supra, the plaintiff claimed that the defendants instituted an action under the California Environmental Quality Act "for the purpose of coercing a monetary settlement rather than to further environmental concerns." This claimed improper motive was held to be irrelevant: the mere filing or maintaining of a lawsuit simply cannot give rise to a claim for abuse of process.

So here, Armstrong's claims that the Church filed documents in cases because of allegedly impure motives is irrelevant as well as untrue. The documents were demonstrably related to the subject matter of the action, and are absolutely privileged.

IV. DEMURRER SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND, AND ARMSTRONG AND HIS ATTORNEY SHOULD BE SANCTIONED

A demurrer should be sustained without leave to amend "if it appears from the complaint that under applicable substantive law there is no reasonable possibility that an amendment could cure the complaint's defects." Heckendorn v. City of San Marino (1986) 42 Cal.3d 481, 486, 723 P.2d 64, 229 Cal.Rptr. 324, 327. It is appropriate to sustain a demurrer without leave to amend if it is apparent from the pleadings that the stated claims are barred by the statute of limitations. CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal.App.3d 1525, 1529, 282 Cal.Rptr. 80, 82. Indeed, the plaintiff (or cross-complainant) bears the burden of showing that there is a reasonable possibility that the defect in a complaint (or cross-complaint) can be cured. Blank v. Kirwan (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 721-22.

Here, the Church has conclusively demonstrated that (1) most of the allegations contained in the second amended cross-complaint, specifically allege discrete events

which are claimed to have occurred beyond the applicable statute of limitations,[10] and (2) the remaining paragraphs allege actions which do not describe the use of process and/or are absolutely privileged under California Civil Code Section 47, and cannot represent any element of a claim for abuse of process. This is Armstrong's third attempt to state a claim for abuse of process against his former church. All that he has demonstrated thus far is that he can plead endless amounts of meaningless invective. He should not be permitted to destroy the time of this court any further.

Further, sanctions are in order pursuant to C.C.P. § 128.5, because Armstrong has repeatedly filed frivolous claims. This is a textbook example of a case "where any reasonable attorney would agree that the action is totally and completely without merit." Finnie v. Town of Tiburon (1988) 199 Cal.App.3d 1, 12, 244 Cal.Rptr. 581, quoting Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal.App.3d 1170, 1176-1177, 230 Cal. Rptr. 289. Yet this is the third time that plaintiff and its counsel have been forced to respond to Armstrong's meaningless venom. This time, Armstrong should be required to pay plaintiff's fees and costs.

CONCLUSION

Armstrong's opposition to plaintiff's well-reasoned demurrer is long on rhetoric and short on logic. California authority and common sense dictate that demurrer be sustained, that Armstrong be given no further opportunity to amend the cross-complaint, and that he and his attorney be sanctioned for burdening the Court with multiple frivolous filings.

Dated: June 8, 1994

Respectfully submitted,

BOWLES & MOXON

By: Laurie J. Bartilson
Laurie J. Bartilson

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[10] The applicable statute of limitations is the one-year statute of limitations pursuant to Code of Civil Procedure Section 340. Thornton v. Rhoden (1966) 245 Cal.App.2d 80, 95, 53 Cal.Rptr. 706, 717.

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CHURCH OF SCIENTOLOGY INTERNATIONAL

ARMFRAUD\NEWREP.DEM

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Boulevard, Suite 2000, Los Angeles, CA 90028.

On June 8, 1994 I served the foregoing document described as REPLY IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S DEMURRER AND MOTION TO STRIKE GERALD ARMSTRONG'S SECOND AMENDED CROSS-COMPLAINT on interested parties in this action,

[ ] by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

[X] by placing [ ] the original [X] true copies thereof in sealed envelopes addressed as follows:

FORD GREENE **FAX AND MAIL**
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949

MICHAEL WALTON
700 Larkspur Landing Circle
Suite 120
Larkspur, CA 94939

[X] BY MAIL

[ ] *I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on June 8, 1994 at Los Angeles, California.

[ ] **(BY PERSONAL SERVICE) I delivered such

envelopes by hand to the offices of the addressees.

[ ]** Such envelopes were hand delivered by Messenger Service

Executed on _____, at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Matt Ward
Print or Type Name

Matt Ward
Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)